NO. 82-1023

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL CALLAHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS, GARRETT JOHNSON, DAVID McLAURIN and EDDIE JAMES CARTHAN,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI STATE SUPREME COURT.

JURISDICTION

A petition for writ of certiorari was heretofore filed with this Court on December 13, 1982. Pursuant to Supreme Court Rule 22, petitioners hereby move to supplement the petition for certiorari with the February 18, 1983 decision of the Mississippi Supreme Court

on the petition for rehearing upon petition for writ of error coram nobis, annexed hereto. (Appendix 3)

SUPPLEMENTAL STATEMENT

The opinion of the Mississippi Supreme Court neither grasps, nor acknowledges, that this case concerns a black mayor who acted to preserve the integrity of his office by preventing the usurpation of the town's police department. Rather, the Court ignores the fundamental constitutional violations that flowed from an unexpected critical concession by State of Mississippi. The court views this case as one where that concession had no effect upon the nature and constitutionality of the trial.

The State of Mississippi prosecuted Mayor Carthan for an alleged assault upon one of his subordinates, one James

Harris, a local police officer. It was apparent that this confrontation between Mayor Carthan and James Harris grew out of an effort of a faction of the Tchula Board of Alderman to usurp the powers of the Mayor.[1] That faction appointed a new police chief, James Andrews, who had been defeated by Carthan in the mayoral election. Andrews took charge of the police department and gave orders to James Harris.

During oral argument of the underlying appeal before the Mississippi Supreme Court, the State of Mississippi conceded, for the first time, that Andrews was not lawfully appointed. It necessarily follows that

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[1] See Petition for Certiorari, pp.6-9.

Andrews had no power to give orders to Harris.

No longer was this a case of an alleged assault upon a police officer. It suddenly became obvious that it was a case of a black mayor trying to prevent the usurpation of his office.

The State, at trial, obviously understood the lynchpin of Andrews' status. It presented testimony to prove that Andrews was lawfully appointed. [2] This claim was presented

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[2] The State first called the City Clerk, Jewel McPhail, to testify from the minutes of the Board of Aldermen of April 30, 1980. She stated that Andrews was voted by the Board to be police chief. Andrews testified that he was called by three aldermen and told that he was police chief and proceeded to operate accordingly including calling Harris to the police station to assist him and removing acting police chief, John Dale. Mississippi law requires a bond and oath of office prior to a lawful appointment; both McPhail and Andrews testified that there was no time to get one.

despite the fact that the minutes of the Board of Alderman meeting of April 30, 1980 showed that no such appointment was recorded. Surely, at trial, the State either knew or should have known that the appointment was not lawful.

The jury was presented with this evidence without any instructions that placed before them the requirements for lawful appointment of a police chief. Thus, the State's evidence, combined with the Court's failure to properly instruct the jury, left them to draw the conclusion that Harris was acting "within the scope of his duties" because he obeyed the orders of the "lawfully appointed" Andrews.

When faced with the serious implications flowing from the State's concession that Andrews was not lawfully appointed, the Mississippi Supreme Court avoided the constitutional issue by declaring Andrews' status to be irrelevant and attempted to narrow the issue to whether Harris was acting "within the scope of his duties." (App.3 pp.7-9) What this logic fails to address is the essence of the case; the scope of Harris' duty was inherently dependent upon Andrews status. The Mississippi Supreme Court wholly ignores this critical rule of law.

It is virtually unheard of that a Mayor would be prosecuted for acts to prevent what is now admittedly an unlawful usurpation of a town's police department. It is conceivably justified to prosecute a Mayor if the

State believed that Andrews was lawfully appointed. However, when the State conceded he was not, it became apparent that not only was the trial replete with constitutional violations but that a prosecution and conviction based upon false testimony was the latest tactic by the State of Mississippi to challenge the full voting rights of Black people of Mississippi.

Once again, the Mississippi Supreme Court opinion obfuscates petitioners 13th, 14th and 15th Amendment claims, in this instance by mischaracterization. Contrary to the Court's statement (App. 3, p. 6-7), this claim is not the same as the selective and arbitrary prosecution argument advanced pretrial. This claim flowed directly from the State's concession and concerns not merely the

fact of prosecution, but the prosecution and conviction based upon false testimony.

The Court also fails to acknowledge that the full constitutional implication of the failure to instruct on the powers and duties of the Mayor and the requirements for the lawful appointment of a police chief only became apparent with the State's concession. (App.3,p.6) Since the Court's opinion on the underlying appeal did not address the concession and its impact on the failure to properly instruct the jury, this matter could not have been properly raised in a petition for rehearing. (See App.3,p.6) It had to be addressed based upon "new facts" in a petition for error coram nobis which petitioners promptly filed.

Not only does this recent opinion obfuscate these issues, but the Court's opinion regarding the claim of ineffective assistance of counsel is a result of the State's attempt to delay petitioners' access to the federal courts.[3] The Court reviews petitioner's substantial indicia of ineffective assistance and announces that the claims are not presented with enough "specificity". With the exception of presenting a list of witnesses and a summary of their testimony to the Court, it is a mischaracterization of the petition for writ of error coram nobis to claim that they were presented in "broad general terms." A copy of

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[3] See n.2 in the Petition for Cert, pp.2-3 quoting the State's plea to the Mississippi Supreme Court to prevent petitioners access to federal court.

that petition is annexed hereto. (Appendix 4 see pp.12-16) Sufficient facts and specific allegations were presented to allow a full hearing in this matter. The Court's opinion can only be read as an effort to prevent petitioner from immediate access to this Court.

CONCLUSION

This case has been permeated with masks of deception of serious constitutional proportions. The recent opinion of the Mississippi Supreme Court does little to remove that mask and can only be viewed as Mississippi's latest and most sophisticated attempt to deny the right of black citizens to elect one of their own to govern. The petition for certiorari should be granted.

Respectfully submitted,

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Dated: March 8, 1983

APPENDIX 3

IN THE SUPREME COURT OF MISSISSIPPI
MISC. NO. 1445

SAMUEL CALLAHAN, DAVE McLAURIN,
EDDIE JAMES CARTHAN, JOHN DALE,
TOM COMMON, R. JAMES MATTHEWS
AND GARRETT JOHNSON

v.

STATE OF MISSISSIPPI

EN BANC
PRATHER, JUSTICE, FOR THE COURT:

This cause involves (1) petitions for rehearing filed by both the appellants and the state on denial of petition for writ of error coram nobis filed by the above named seven petitioners, and (2) an application for bail filed by Eddie James Carthan. The prior opinion of the Court handed down the 10th day of November, 1982, is withdrawn, and the following is now the Court's opinion.

The petitioners were convicted for the crime of assaulting a police

officer in the Circuit Court of Holmes County.[1] On appeal, we affirmed in an unanimous decision. Callahan v. State, 419 So.2d 165(Miss.1982). No petition for rehearing was filed in the case (No. 53,361), and the time for filing such a petition has expired. Miss. Sup. Ct. Rule 14.

On October 1, 1982, the petitioners filed their post-conviction petition for relief (Misc.No. 1445), which was entitled petition for writ of error coram nobis. The assignments of error in the petition were concerned with both the trial and appellate

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[1]Each of the petitioners were sentenced to serve terms of three(3) years. However, the sentences of Callahan, Dale, Johnson, Common, Matthews, and McLaurin were suspended. Only Carthan was required to serve time in prison.

proceedings, and may be summarized as follows:

1. Due Process - failure of trial court to instruct on powers and duties of mayor (requested instructions D-2 and D-3 and requirements for lawful appointment of a chief of police (requested instruction D-6).

2. Due Process - use by the state of false "facts and theories" to obtain a conviction.

3. Due Process - affirmation by this Court of petitioners' convictions upon a theory different from that employed in the trial court.

4. Thirteenth, Fourteenth and Fifteenth Amendments - use of the criminal process to disenfranchise black voters.

5. Sixth/Fourteenth Amendment - denial of effective assistance of counsel.

Carthan filed his additional petition for bail in order to obtain a release from confinement while this Court considered the petition for writ of error coram nobis.

I.

We first adress the petition for writ of error coram nobis by recognizing a basic premise in this jurisdiction that such postconviction petitions are limited in nature. Justice Ethridge, in the case of In re Broom's Petition, 251 Miss. 25, 168 So. 2d 44 (1964), set forth the circumstances in which a writ for error coram nobis would lie. His opinion states:

> The general scope of a petition for writ of error coram nobis, or motion in the nature thereof, is to bring before a court a judgment previously rendered by it, for the purpose of review or modification. There must be some error of fact and not of law affecting substantially the validity and regularity of the proceedings, which was not brought into issue at the trial. Such motion or petition is an extraordinary and residual remedy to correct or vacate a judgment on facts or grounds not appearing on the face of the record, not available by appeal or otherwise, and not discovered until after

> rendition of the judgment, without fault of the party seeking relief. It is an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record, which deprived accused without fault on his part of the constitutional right to a fair trial. [Emphasis added]. [251 Miss. at 32-33, 168 So. 2d at 48].

With this background in mind, our Court has since ruled that the writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court. Auman v. State, 285 So.2d 146 (Miss. 1973). Moreover, "a defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again." Holloway v. State, 261 So. 2d 799, 800 (Miss.1972).

IIA.

The petitioners' first assignment of errors concerns the failure of the trial court judge to grant certain jury instructions requested by the petitioners' counsel. (D-2 and D-3 were instructions definding the powers and duties of mayors) (D-6 defined the requirements for the lawful appointment of the chief of police). This same issue was raised by the petitioners on appeal. 419 So. 2d at 176. The proper time to reconsider such an issue would have been on a rehearing of the appeal, but the petitioners failed to file for a rehearing. They cannot now attempt to relitigate a question of law already decided on appeal by this Court through a petition for writ of error coram nobis.

IIB

For the same reason, the petition-

ers' fourth assignment is also an improper ground for granting a writ of error coram nobis. The fourth assignment alleged that the prosecution unconstitutionally chose to prosecute the petitioners in order to disenfranchise black voters. On appeal, the petitioners argued that the state selectively and arbitrarily chose to prosecute the petitioners. Id. at 171. It is readily apparent that the petitioners are simply attempting to relitigate the same question of law again. Consequently, this assignment does not meet the "error of fact" requirement.

IIC.

The petitioners' second assignment alleges that the state used false "facts and legal theories" to obtain the convictions. This claim is based

on an alleged admission by the state's appellate attorney, during oral argument before this Court, that Jim Andrews was not a lawfully appointed officer when he was assaulted by the petitioners. As a result of this supposed admission, the petitioners additionally contend, in their third assignment, that their convictions were affirmed on "grounds alien to the theory upon which the prosecution proceeded at the trial level."

The petitioners' claims are totally devoid of merit because the prosecution proceeded, throughout trial and on appeal, on the theory that the petitioners had assaulted James Harris, a member of the Tchula police department. The indictment on which the petitioners were charged specifically accused them of attempting to cause serious bodily injury to James Harris.

At trial, the facts revealed that both Harris and Andrews were assaulted during the incident in question. In fact, the petitioners claimed on appeal that they were entitled to a peremptory instruction because the state had allegedly failed to prove that Harris was a police officer acting within the scope of his duty. Id. at 174. On appeal, we noted that the case involved an attack on Harris. Id. at 177. Clearly, the prosecution proceeded on the basic premise that Harris was the victim of the crime charged, and did not proceed on the premise that Andrews was the victim. These assignments fail to supply the petitioners any basis for a writ of error coram nobis.

IID.

The petitioner's final assignment involves a claim of ineffective counsel, an issue not asserted on appeal.

We address it for the first time in this post conviction proceeding.

Since 1932, the United States Supreme Court has recognized that the constitutional right to assistance of counsel in criminal cases includes the right to effective assistance of counsel. Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955); Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). But, the Court has never fashioned a specific test for determining whether a defendant has received effective counsel. Comment, The Sixth Amendment Right to Effective Counsel: What Does It Mean Today?, 59 Neb.L. Rev. 1040 (1980); T. Fitzhugh, III, Providing Effective Assistance: The Duty of Defense Counsel, 4 Am.J. of Crim.L. 123 (1975-76). In McMann v.

Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed 2d 763(1970), the Court stated that an attorney's service must be within "the range of competence demanded of attorneys in criminal cases," but that questions involving the effectiveness of counsel should generally be "left to the good sense and discretion" of the lower courts. 397 U.S. at 771. Beyond this general language, the United States Supreme Court has placed the responsibility of specifying standards for adequate representation by counsel upon the lower courts. This has resulted in several different standards by the various federal courts of appeal. Comment, Ineffective Assistance of Counsel: Who Bears the Burden of Proof?, 29 Bay L.Rev. 29 (1977).

In Mississippi, our Court has applied several different tests. See,

e.g. Edwards v. State, 413 So.2d 1007 (Miss.1982) ("offensive to the common and fundamental ideas of fairness and right" test); Parham v. State, 229 So.2d 582 (Miss.1969)("mockery of justice" test); Stewart v. State, 229 So. 2d 53 (Miss.1969) ("reasonable likely to render and rendering reasonably effective assistance" test).

In MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), the federal court employed for the first time the test of "counsel reasonable likely to render and rendering reasonable effective assistance." Id, at 599. This test is now used regardless of whether counsel is appointed or retained. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed. 2d 333 (1980). And, under this test, the court must not limit itself to a review of the counsel's performance at trial. Washington

v. Watkins, 655 F.2d 1346 (5th Cir.1981), cert. denied, ____U.S.___, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

In applying the test, the first line of inquiry is to determine whether the counsel was reasonable likely to render reasonably effective assistance. In Washington v. Watkins, supra, the court reviewed the counsel's education, experience, and expertise in criminal cases. Recently, in Bell v. Watkins, 692 F.2d 999 (5th Cir.1982), the court considered the assistance reasonable likely to be rendered by a recent law school graduate. The court ruled that such assistance would not be held ineffective as a matter of law.

The second line of inquiry is to determine whether counsel in fact rendered reasonable effective assistance in that case. Bell v. Watkins, supra. In addition, if counsel failed

to provide reasonable effective assistance, the defendant must show that he was prejudiced in a way that would not have come about had his rights been constitutionally protected. Washington v. Watkins, supra at 1360. Thus, the petitioners must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of their defense. Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982) (overruling Washington v. Strickland,d 673 F.2d 879 (5th Cir.1982). And, "even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel." (emphasis ours.) Id.

Addressing the first line of inquiry regarding whether counsel was reasonable likely to render reasonably effective assistance, we note that in the lower court counsel for the defendants were Alix H. Sanders and Fred Sanders of Greenwood. On the appeal phase to this Court, the file reflects counsel to be Alix H. Sanders and Charles Victor McTeer of Greenville. No background appears on education, experience, or expertise.[2] In fact, the petition for writ of error coram nobis does not contend that counsel was

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[2]Law listings reveal that Alix H. Sanders was born in 1942 and received a B.A. Degree from Jackson State College, Jackson and a J.D. Degree from University of Mississippi. He was admitted to the Bar in 1969. Charles V. McTeer was born in 1948. His B.A. was from Western Maryland College and his J.D. Degree was from Rutgers University.

reasonably unlikely to render reasonably effective assistance because of inadequate education, experience, or expertise in criminal cases. Therefore, we must conclude that both trial and appellate counsel were reasonable likely to render effective service.

As to the second inquiry, we must discuss the performance actually rendered to determine whether counsel provided reasonably effective assistance. Specific areas of alleged ineffective performance in this petition may be summarized as follows:

I.

ON PRETRIAL

1. Counsel's failure to properly prepare and investigate the background of the case.

II.

DURING TRIAL

2. Counsel's failure to subpoena available witnesses who could corroborate the defendant Carthan's testimony as to the appointment of Andrews.

3. Counsel's failure to object to hearsay testimony from Jewel McPhail on the appointment of the police chief.

4. Counsel's failure to present evidentiary support on lawful appointment of a police officer.

5. Counsel's failure to submit proper instructions.

6. Counsel's failure to raise objections in constitutional terms.

III.

ON APPEAL

7. Failure to properly assign error in accordance with applicable

state law and in constitutional terms with authorities cited.

In analyzing the allegations of ineffective assistance, we note that the petition assigns the above enumerated shortcomings in very broad general terms. No allegation with specificity is given as to which unnamed witnesses were available, what witness would corroborate testimony, what instructions of the law were omitted, or what objections to testimony were overlooked by defense counsel.

In addition to the above inadequacies the defendants failed to show how their case was prejudiced by such omissions with specificity. The petitions make no such allegation of how the outcome of the proceedings would have been altered had counsel performed differently.

Since the application fails to state, with specificity, the grounds of ineffective assistance of counsel and the resulting prejudice to the petitioners' defense, we are unable to grant the petitioners leave to file a petition for writ of error coram nobis with the lower court. Miss. Sup. Ct. Rule 38. However, the petitioners are granted leave to file a new application and affidavits showing more specific examples of ineffective counsel, if any, and of resulting prejudice.

III.

On the issue concerning the motion for bail filed by Eddie James Carthan,[3] we must deny his request for relief, having denied the petition for writ of error coram nobis.

ALL JUSTICES CONCUR.

Dated: February 18, 1983

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[3]Eddie James Carthan has also been convicted of the federal crime of obtaining loans from a federal bank through the making of false statements. His conviction for that crime has been affirmed as well. United States v. Carthan, No. 82-4090, slip op. at 1 (5th Cir. Jan. 3, 1983).

APPENDIX 4

IN THE SUPREME COURT

OF

THE STATE OF MISSISSIPPI

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SAMUEL CALLAHAN, DAVE McLAURIN,
EDDIE JAMES CARTHAN, JOHN DALE,
TOM COMMON, R. JAMES MATTHEWS
AND GARRETT JOHNSON

v. No.53361

STATE OF MISSISSIPPI

----------X

PETITION FOR WRIT OF ERROR CORAM NOBIS

COMES NOW the petitioners, SAMUEL CALLAHAN, DAVID McLAURIN, EDDIE JAMES CARTHAN, JOHN DALE, TOM COMMON, R. JAMES MATTHEWS and GARRETT JOHNSON, by and through their attorney of record Hon. Charles Victor McTeer and file this Petition for Writ of Error Coram Nobis vacating the judgment of this Court of August 18, 1981, which affirmed the conviction of petitioners

for simple assault upon a law enforcement officer and for grounds would show the following, to-wit:

1. This petition brings before the court the conviction of the petitioners under circumstances representing a gross violation of their constitutional rights.

2. Petitioners were convicted of assaulting a police officer, one of his subordinates, by a trial jury which was not instructed as to the powers of the Mayor as chief law enforcement officer of the commmunity. The case was submitted to the jury despite the indisputable facts establishing that the Mayor was absolutely correct, and duty bound by Mississippi law to disarm and discharge his subordinate who was abiding in an effort to usurp, by force, the powers of the mayor.

3. The trial conviction of petitioners has meaning far beyond the confines of the due process issues in this case. The violation of constitutional rights is so gross that it can only be read as a challenge to the exercise of full voting right by the black people of Mississippi as guaranteed by the Fifteenth Amendment of the U.S. Constitution. Petitioners were prosecuted, and stand convicted ultimately because Carthan was the first black mayor elected in the town of Tchula -- a circumstance which its white minority population has bitterly resisted and the conviction was achieved through patent denial of due process rights.

4. The State's unexpected concession at oral argument before this Court that James Andrews was not lawfully appointed police chief on April 30,

1980 revealed the fundamental constitutional flaws in this case. That factual issue was the cornerstone of the State's case at trial. The concession placed, in the constitutional perspective, the trial court's failure to instruct the jury on fundamental legal principles - the powers and duties of the Mayor and the requirements for lawful appointment of a police chief. The failure to so instruct violated petitioners' right under the due process clause of the Fourteenth Amendment of the United States Constitution.

5. Beyond that, however, the concession established a critical constitutional flaw in the prosecution. The State has now admitted that it had provided a set of facts and legal theories known to be false. This act

constitutes an independent denial of due process of law.

6. This Court, in its opinion dated August 18, 1982, sustained the convictions without mentioning the concession pointed out above. However, because of that concession, this Court could not possibly sustain the convictions on the theory upon which it was tried and presented to the jury. Accordingly, in its opinion, this Court developed a new theory upon which to sustain the convictions.

7. This petition is based upon the submitted memorandum of points and authorities, the attached affidavit of counsel, exhibits attached hereto and the records and files herein.

8. In June, 1977, Eddie James Carthan was elected the Mayor of Tchula by defeating a white person - former Town Marshall, Jim Andrews. Although

Tchula's population had been predominantly black for many years, Mr. Carthan was the first black person to serve as Mayor of the Holmes Court hamlet. Numerous incidents soon followed the 1977 election demonstrating that municipal government in Tchula would be beset with continued bickering, legal maneuvering and racial tension. The Tchula Board of Aldermen, elected in 1977 with Mr. Carthan, included four blacks and one white. Two of the black members of the Board began to side with the one white Board member upon various controversial issues. As a majority, these three officials reduced the mayor's salary from $600 per month to $60. They often refused to attend numerous Board meetings, thereby denying the City a quorum to conduct municipal business. They often refused to approve City

checks and drafts. On one occasion, they closed the doors of City Hall for municipal business. Soon Mayor Carthan was thwarted in any attempt to govern the City under the powers afforded him under Mississippi law or exercise the authority formerly exercised by his white predecessors. Municipal business came to a practical standstill.

9. In April, 1980, the entire Tchula Police Department resigned. Thereafter, Mayor Carthan, exercising his powers and duties, appointed officer John Dale to run the Department pending appointment of a new chief by the Board of Aldermen. On April 30, 1980, a special meeting was held by the Board to appoint the new police chief. Following a heated discussion, the meeting ended without any decision. Thereafter, the three majority members of the board met privately at a local

convenience store and decided Jim Andrews, Mr. Carthan's 1977 mayoral opponent, should be chief.

10. Andrews was immediately notified. Acting quickly, Andrews armed himself and went to see Johr Dale who was on duty at the police department. Andrews advised Dale he was terminated. Dale left the premises and notified Mayor Carthan of the recent events. Carthan contacted the Sheriff regarding the matter. The Sheriff, however, took no action. Carthan and others then went to City Hall to talk to Mr. Andrews. Meanwhile, two other municipal employees - Officer James Harris and night watchmen James T. Rhynes, in the absence of any authority, joined and assisted Mr. Andrews in his takeover of the City Hall.

11. An altercation ensued after the two groups confronted each other in

the police department. As a result of those events, Carthan filed an affidavit complaining that Andrews assaulted him with a weapon. Andrews filed a similar affidavit against Carthan and his group. The State declined to prosecute Mayor Carthan's charges. Instead, the charges were pursued solely against Mr. Carthan and his supporters.

12. At trial, held before the Hon. Franklin Webb of the Circuit Court of Holmes County on April 20 and 21, 1981, the central thesis of the State's case was that James Andrews was lawfully appointed as police chief on April 30, 1980. The State neither argued not submitted instructions that the issue was whether the Mayor and his police had used "excessive force" -the theory upon which this court sustained

the conviction. The State's theory was based on Andrews' status - if Andrews was lawfully appointed, the Mayor was engaged in an assault by taking over the police department.

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[1] The State called Jewel McPhail as its first witness to testify concerning the minutes of the Board of Aldermen on April 30, 1980. She stated that the minutes "reflect that Jim Andrews was hired as a --- Chief of Police the night of April 30." R.35; Opinion of the Mississippi Supreme Court p.12 (hereinafter referred to as "Op.") Andrews testified that he considered himself the duty authorized city police chief because of the directions of the majority of the Board of Aldermen following the special meeting. Op.p.18.

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13. All proposed defense instructions relating to the duties and powers of the Mayor and Andrews' lawful status were rejected by the trial court.

14. The jury was not told of the lawful powers and duties of the Mayor nor of the requirements for lawful

appointment of Andrews as police chief. There was no indication that Harris's lawful authority to refuse the Mayor's command that he leave the City Hall premises was dependent upon Andrews' doubtful status of chief of police.

15. The constitutional issues in this case arising out of the State's concession at oral argument were duly presented to the court promptly after they arose by way of a motion and supplemental memorandum of law (Exhibit I). As indicated in that memorandum, the effect of that concession was that the State of Mississippi was asking a jury to convict without regard to the law and upon a factual and legal theory that the State recognized to be invalid, thereby violating fundamental notions of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

16. The constitutional issues arising from this Court's effort to sustain the conviction upon a theory different from the basis upon which it was tried is here presented for the first time. It could not have been presented before this Court announced its opinion.

17. The constitutional issues arising from the trial Court's failure to properly instruct the jury were duly presented at trial, although not in constitutional terms. The issue was first raised in constitutional dimensions in petitioners' post-argument supplemental memorandum. The failure of trial counsel to recognize the constitutional violations and assign error in constitutional terms denied petitioners effective assistance of counsel. Trial counsel failed not only to understand the broad constitutional

dimensions of this case, but the essence of the case itself as indicated by the trial record. Trial counsel failed to properly prepare and investigate the factual background of this case. No available witnesses were subpoenaed or called to testify regarding the events in Tchula that led to this incident. This testimony was necessary to an adequate factual understanding of the case and its Fifteenth Amendment context.

18. Trial counsel failed to investigate, prepare and call available witnesses to corroborate Carthan's version of the events. Counsel failed to properly investigate, prepare and present a crucial aspect of the case whether James Andrews was lawfully appointed on April 30, 1980. Certain members of the Board of Aldermen were not called to testify, each of whom

could have established that Andrews was not lawfully appointed.

Trial counsel failed to object to the hearsay testimony of Jewel McPhail upon the critical aspect of the case - the appointment of Andrews. McPhail testified from minutes of the April 30, 1981 meeting. Not only was there no foundation to allow McPhail to testify as to contents of the minutes but McPhail's testimony concerning those minutes was incorrect.[2] Counsel failed to present testimony on the method for lawful appointment of a police chief. Counsel failed to establish whether or not Harris had been told, by the petitioner Mayor, that the "police department would continue as it was" thereby substantiating that Harris was acting outside the "scope of the his duties."[3] Counsel presented instructions to the

Court pertaining to lawful appointment of a police chief without evidentiary support.[4]

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[2] The minutes of the meeting of the Board of Aldermen on April 30, 1981 clearly show that Andrews was not appointed.

[3] This testimony was presented at the hearing on the motion to quash but not at trial. Op.p.5. Failure to present such testimony certainly cannot be deemed a trial tactic since there was no tactical reason for its exclusion.

[4] Instruction 8 and 9. As to Instructions 6, evidence existed to support this instruction. See, Brief p. 5 infra.

Trial counsel failed to submit specific instructions that would be deemed proper by the Mississippi courts. Counsel failed to make motions of record to insure adequate review on appeal. Counsel failed to properly object to the trial court's wholesale failure to instruct the jury on the law

of the case. At trial, exceptions were not supported with appropriate authority, nor raised in constitutional terms. On appeal, trial counsel failed to properly note assignments of error in accordance with applicable state law, failed to raise critical constitutional issues and failed to cite appropriate authorities.

19. The opinion of the Supreme Court of Mississippi, announced on August 18, 1982, affirmed the convictions. The opinion did not address the constitutional issues raised in petitioners' supplemental memorandum nor did the opinion directly address the effect of the critical fact of the States' concession.

WHEREFORE, PREMISES CONSIDERED, the Petitioners pray the Court grant the Petition for Writ of Error Coram Nobis and upon due consideration order

that the conviction of April 21, 1981, be set aside and that the defendants be granted a new trial.

RESPECTFULLY SUBMITTED, this 29th day of September, 1982.

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